

THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN UNITED STATES COURTS

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The Convention, faute de mieux, will often be applied by tribunals (judges or arbitrators) who often will be intimately familiar only with their own domestic law.

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*These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.*¹

I. INTRODUCTION

Black's Law Dictionary defines "uniform" as "[c]onforming to one rule, mode, pattern, or unvarying standard; not different at different times or places."² The purpose of a uniform statute is to provide a set of guidelines or rules from which all courts applying that statute will decide similar cases in the same way. Ideally, the application of a statutory provision in two different cases should vary only based on the facts of the case; the law should be clear and given.

On the international level, a uniform code can serve the same function of deciding two factually similar cases in the same way. However, the goal of uniformity on the supranational level is more complex. First, the differences in legal systems among countries make enacting a uniform code with detailed provisions an elusive task.³ Vagueness and generality are the alternative in order to satisfy countries with both common law and civil law systems.⁴ Second, not only is there a difference in legal systems, there is more variance among substantive laws from country to country than among the fifty United States.⁵ Finally, an international body to reconcile varying interpretations of different jurisdictions may be particularly necessary because of the

1 JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989).

2 BLACK'S LAW DICTIONARY 1530 (6th ed. 1990).

3 See Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21 (1995).

4 See *id.*

5 See Secretariat Commentary on the 1978 Draft, International Character of the Convention, 1, 2 available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> (last modified Sept. 2, 1998) (arguing that it is especially important to avoid differing constructions of the provisions of the Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum).

difficulty in achieving uniformity between many nations with different languages and court systems.⁶

The need for uniformity in international sales law resulted in the creation of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter “Convention” or “CISG”) in 1980.⁷ On January 1, 1988, the Convention went into effect with eleven ratifying states, including the United States.⁸ As the CISG becomes the applicable law in many international transactions, case law on the Convention is increasing among courts in numerous countries. Today, the number of judicial and arbitral awards exceeds 300, its international bibliography reaches well over 2000 pages, and its commentaries are published in numerous languages.⁹ Over the past several years, U.S. federal courts have grappled with cases where the Convention is the governing law.¹⁰ This paper will examine the interpretative policies of U.S. courts when applying the CISG. Specifically, this paper will focus on five cases and examine the way U.S. federal courts have dealt with interpreting the CISG. Moreover, in many cases involving contracts for the sale of goods, a provision of the CISG will not be directly on point to solve the legal issue presented in the case. This article will look at various interpretation “techniques” or “models” for the Convention advanced by numerous commentators and examine their applicability in U.S. courts.

Part I looks at the creation of the CISG and the goals that it sets out to achieve. Part II examines Article 7 of the CISG, which governs the interpretation of the Convention. Part III

6 See Camilla Baasch Andersen, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, 10 PACE INT’L L. REV. 403, 404 (1998) (arguing that uniformity is a difficult goal to achieve, because uniform words do not always ensure uniform results).

7 United Nations Convention on Contracts for the International Sale of Goods, United Nations Conference on Contracts for the International Sale of Goods, at 78 U.N. Doc. A/CONF. 97/18, Annex I (1981) (opened for signature Apr. 11, 1980).

8 See AMERICAN BAR ASSOCIATION, *THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS* 1 (1987) [hereinafter ABA].

9 Nives Povrzenic, *Interpretation and Gap-filling under the United Nations Convention for the International Sale of Goods*, available at <http://www.cisg.law.pace.edu/cisg/text/gap-fill.html> (last modified Apr. 1997).

10 See Ron Andreason, *MCC-Marble Ceramic: The Parole Evidence Rule and other Law under the Convention on Contracts for the International Sale of Goods*, 1999 BYU L. REV. 351, 352 (1999) (discussing that of the 464 cases governed by the CISG only thirty-two have involved U.S. companies; therefore, federal courts have not had a significant opportunity to interpret the CISG).

looks at seven potential sources to interpret the CISG when an article in the CISG is not directly on point for the issue presented in a particular case. These seven sources in order of their degree of persuasiveness are: (1) general principles of contract law contained in the CISG; (2) the legislative history of the CISG; (3) case law from foreign jurisdictions interpreting the Convention; (4) treatises and commentary of noted scholars on the CISG; (5) general principles of private international law; (6) case law from domestic jurisdictions interpreting the Convention; and (7) case law from domestic jurisdictions interpreting domestic sales law such as Article 2 of the UCC. Part IV analyzes five significant cases that involve the CISG in U.S. courts:

- *Filanto, S.p.A. v. Chilewich Int'l. Corp.*,¹¹
- *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino*,¹²
- *Delchi Carrier, S.p.A v. Rotorex Corp.*,¹³
- *Mitchell Aircraft v. European Aircraft Services AB*,¹⁴
- *Helen Kaminski Pty., Ltd. v. Marketing Australian Products*.¹⁵

Part V examines how U.S. courts have dealt with the Convention in the five cases above in light of the seven sources of interpretation. Finally, the article discusses the methodology courts should use when interpreting the CISG in the future.

II. SHORT HISTORY OF THE CISG.

On April 11, 1980, during a Diplomatic Conference in Vienna, the CISG was approved after more than fifty years of preparatory work initiated by Ernest Rabel, the esteemed German jurist.¹⁶ On January 1, 1988, the Convention went into force with the United States as one of eleven countries ratifying the Convention.¹⁷ After the CISG received the

¹¹ 789 F. Supp. 1229 (S.D.N.Y. 1992).

¹² 144 F.3d 1384 (11th Cir. 1998).

¹³ 71 F.3d 1024 (2nd Cir. 1995).

¹⁴ 23 F. Supp. 2d 915 (N.D. Ill. 1998).

¹⁵ 1997 WL 414137 (S.D. N.Y. July 23, 1997).

¹⁶ See Evelier Visser, *Favor Emptoris: Does the CISG Favor the Buyer?*, 67 UMKC L. REV. 77, 79 (1998).

¹⁷ Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737 (1989)

requisite two thirds vote from the Senate and was approved by President Reagan, it became effective in the United States.¹⁸ Thus, under the Supremacy Clause of the United States Constitution, the Convention, when applicable, will displace any contrary state sales law such as the UCC.¹⁹

The drafting history of the CISG lends some perspective on its interpretative policy. The process of obtaining consensus in international sales law proceeded in two stages.²⁰ The present Convention is a direct result of the first stage of the project, which began at the Sixth Session of the Hague Conference on Private International Law in 1928.²¹ In the 1920s and 1930s, all the participants came from the industrialized, capitalist countries of Western Europe, and the draft that emerged was specific to their legal culture.²² During this drafting phase, the primary disagreements centered on the differences between common law and civil law traditions of the participants.²³

The second stage of the Convention's drafting history began after World War II with the voices of a more diverse group of countries, including both developed and developing nations, contributing to what would become the final draft of the Convention.²⁴ In 1964, a conference of twenty-eight countries at the Hague Conference adopted two conventions: the Convention on the Formation of the Contract and the Convention on the Sales Contract.²⁵ The general climate promoting the Hague Conventions was unfavorable. Member States of the United Nations described the Conventions as

(citing to the ABA, *supra* note 8, at 1). The Convention initially went into force between Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia, and Zambia. *Id.* at note 3. As of September 12, 2000, fifty-eight countries have joined the Convention. See *CISG: Table of Contract States*, at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. Current information about which countries have ratified the Convention can also be obtained through the United Nations Treaty Section in New York, N.Y. at (212) 963-3693. *Id.*

18 Ratification of the 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262 (Mar. 2, 1987).

19 U.S. CONST. art. VI, cl. 2.

20 Sutton, *supra* note 17, at 738.

21 See Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 267 (1984).

22 See Sutton, *supra* note 17, at 738.

23 See *id.*

24 See *id.*

25 See Povrzenic, *supra* note 9, at 1.

too dogmatic, complex, and predominantly of the European civil law tradition.²⁶ Dissatisfaction with the 1964 Conventions led to a new round of negotiations and the eventual approval by the United Nations Commission on International Trade Law (“UNCITRAL”) in 1978 of a draft sales convention. The final draft of the Convention on Contracts for the International Sale of Goods was adopted in Vienna in 1980.²⁷ The UNCITRAL body was widely represented, including nine countries from Africa, seven from Asia, five from Eastern Europe, six from Latin America, nine from Western Europe, and others.²⁸ Undoubtedly, the final draft of the Convention reflected this diverse legal tradition. However, with the need for diversity also came the need for compromise among different states in order to reach agreement.²⁹ Thus, it is important for a tribunal to recognize, when interpreting the provisions of the CISG, that the Convention is both a mixture of diverse legal systems and laws, as well as a product of negotiations where specificity sometimes gave in to generality in order for an agreement to be finalized.³⁰

The scope of the CISG also sheds light on the guiding interpretative policy. The CISG applies to contracts for the sale of goods between parties whose places of business are in different states and either both of those states are Contracting States to the CISG, or the rules of private international law lead to the law of the Contracting State.³¹ Because the United States made a reservation to Article 1(1)(b), the CISG is not applicable in reciprocity where one of the parties is the United States, even though the conflicts of law rules lead to the application of the law of the Contracting State.³² Moreover, under the CISG, contracts for the sale of goods are distinguished from contracts for services, which are not covered under the CISG.³³ The Convention also

26 *See id.* at 1–2.

27 *See id.* at 2.

28 *See* John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 *AM. J. COMP. L.* 201, 207 n. 21 (1979).

29 *See* Sutton, *supra* note 17, at 739.

30 *See id.*

31 United Nations Convention on Contracts for the International Sale of Goods art. 1(1), 19 *I.L.M.* 671, 672 (opened for signature Apr. 11, 1980) [hereinafter CISG].

32 Status of the Conventions: Note by the Secretariat at 5, U.N. Doc. A/CN.9/294 (1987), *reprinted in* ABA, *supra* note 8, at 1.

33 *See* CISG, *supra* note 31, art. 3.

excludes several types of sales contracts, elaborated in Articles 2 through 5, that would otherwise fall under Article 1.³⁴ Finally, Article 6 of the CISG supports the freedom of the parties to exclude the application of the Convention or vary any of its provisions.³⁵ Thus, any interpretation of the CISG's provisions must take into account the scope of the Convention's application.

One of the principle aims of the CISG is to achieve uniformity in the application of international sales law. The preamble to the CISG states: "Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."³⁶

In order to promote this uniformity, the CISG provides some instruction on the interpretation of the Convention in Article 7. The meaning behind the language of Article 7 is the focus of the next section.

III. ARTICLE 7 OF THE CISG

To promote uniformity of interpretation, Article 7 of the Convention undertakes the task of guiding the interpretation of the CISG. One commentator on this issue, Phanesh Koneru, claims: "This article is arguably the single most important provision in ensuring the future success of the Convention."³⁷ Article 7 provides:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.³⁸

34 *See id.* art. 2-5.

35 *See id.* art. 6.

36 *Id.* Preamble.

37 Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 106 (1997).

38 CISG, *supra* note 31, art. 7.

Thus, while Article 7(1) governs the rules of interpretation of the text of the Convention, Article 7(2) provides the rules for gap filling when a legal issue does not fall squarely within an article in the CISG.³⁹ The line between interpretation and gap filling is not easy to draw. But Article 7(2) does lead tribunals primarily to the Convention's general principles, and only secondarily to "the law applicable by virtue of the rules of private international law."⁴⁰ In the absence of such principles, Article 7(2) directs a court to choice of law rules to determine which state's laws will apply.⁴¹ Various commentators have struggled with the meaning behind the wording of Article 7(1) and (2), particularly the international character of the CISG and the method by which Article 7 requires the promotion of uniformity.

The Secretariat Commentary on Article 7(1) notes that "national rules on the law of sales of goods are subject to sharp divergence in approach and concept."⁴² The Secretariat emphasized the importance of avoiding differing constructions of the Convention's provisions by national courts, where each court is normally dependent upon concepts used in the legal system of that country.⁴³

Professor John Honnold, who was the U.S. Delegate to the Convention on Contracts for the International Sale of Goods,⁴⁴ notes that the most basic principle in Article 7 is that "interpretation shall respond to the Convention's international character and to the need to promote uniformity in its applications."⁴⁵ Professor Honnold states that the commentary to Article 7 directs tribunals to several sources for promoting this uniformity: the use of legislative history of the CISG; international case law; and scholarly critique.⁴⁶

39 See Hillman, *supra* note 3, at 22.

40 CISG, *supra* note 31, art. 7.

41 See *id.* art. 7(2).

42 Secretariat Commentary on 1978 Draft, *supra* note 5, at 1.

43 See *id.*

44 See Andreason, *supra* note 10, at 377.

45 JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 60 (2nd ed. 1991).

46 *Id.*

Harry Flechtner, a Professor of Law at the University of Pittsburgh School of Law,⁴⁷ takes a different approach from Professor Honnold in grappling with the meaning behind Article 7. Professor Flechtner argues that the CISG does not and cannot mandate absolute uniformity of interpretation because the Convention is not a uniform document, and because the uniformity principle is one of only several interpretative principles contained in Article 7(1).⁴⁸

First, the text of the CISG varies among the six official translations of the Convention.⁴⁹ Second, non-uniformity is found by the many reservations made by State parties to the CISG. Of the fifty-one Contracting States, Professor Flechtner notes that twenty-one States have made reservations, and in several cases multiple reservations, such that the text of the CISG in force varies among the Contracting States.⁵⁰ Third, the CISG refers practitioners to national laws in some cases, for example, in matters dealing with the validity of the contract.⁵¹ Professor Flechtner asserts that Article 7(1) does not mandate absolute uniformity, but rather treats the promotion of uniformity as one consideration in interpreting the CISG.⁵² Other principles in Article 7(1), such as promoting good faith, may take precedent.⁵³

Professor Alejandro Garro⁵⁴ argues that looking to the UNIDROIT⁵⁵ Principles on Contracts for the International Sale of Goods (“*UNIDROIT Principles*”) is an effective way to interpret the CISG.⁵⁶ In the event of gap-filling, the

47 See Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998).

48 See *id.* at 188.

49 The official versions of the CISG are available in Arabic, Chinese, English, French, Russian, and Spanish. See Flechtner, *supra* note 47, at 189.

50 *Id.* at 197.

51 CISG, *supra* note 31, art. 7(1).

52 See Flechtner, *supra* note 47, at 205.

53 See *id.*

54 Alejandro Garro is an Adjunct Professor of Law and Senior Research Scholar at the Parker School of Foreign and Comparative Law, Columbia University. J.D., University of La Plata (Argentina); LL.M. Louisiana State University; J.S.D., Columbia University.

55 UNIDROIT is an acronym for the International Institute for the Unification of Private International Law. ACRONYMS, INITIALISMS, AND ABBREVIATIONS DICTIONARY 3227 (Mary Rose Bonk ed., 27th ed. 1999).

56 See Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1152 (1995) (discussing the fact

UNIDROIT Principles are more likely to be suitable to an international commercial contract rather than a domestic rule of contract law.⁵⁷ According to Professor Garro, supplementing an international instrument like the CISG with the UNIDROIT Principles is the best way of achieving consistency, uniformity, and fairness in the application of the Convention.⁵⁸

Professor Robert Hillman,⁵⁹ in his editorial analysis of Article 7, suggests that the Convention's "international character" and the need for "promoting uniformity" requires decision-makers to avoid local definitions of the language, which would likely lead to narrow and conflicting interpretations of the Convention.⁶⁰ Rather, Hillman proposes that Article 7(1) places an emphasis on the general principles contained in the Convention.⁶¹

Professor Michael Van Alstine⁶² goes further than Hillman, arguing that the need for uniformity stated in Article 7 is an instruction to the federal judiciary to participate in the formation of an international common law around the framework of the CISG.⁶³ Professor Van Alstine envisions U.S. courts adopting a dynamic interpretation of the CISG, recognizing it as a living, maturing body of law founded on certain fundamental values, but capable of adapting to new environments.⁶⁴

In general, while the Convention stresses the importance of the international character of the CISG, it is short on advice for how to achieve this uniformity. Commentators vary

that a practical use of the UNIDROIT principles is to interpret or supplement uniform law instruments such as the CISG).

57 *See id.* at 1153.

58 *See id.* (proposing that enhancement of an international instrument like the CISG with the UNIDROIT principles has the advantage of improving consistency and fairness in the adjudication of international commercial disputes).

59 Robert Hillman is Associate Dean for Academic Affairs and Professor of Law at Cornell University School of Law. B.A. 1969, University of Rochester; J.D. 1972, Cornell.

60 Hillman, *supra* note 3, at 22.

61 *See id.*

62 Michael Van Alstine is an Associate Professor of Law at the University of Cincinnati School of Law. B.A. 1983, St. Norbert College; J.D. 1986, The George Washington University; M. Jur. Comp., 1993 University of Bonn (Germany); Dr. Juris 1994, University of Bonn (Germany).

63 *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 693 (1998).

64 *See id.* at 792.

greatly on their understanding of Article 7 and provide different solutions to promote uniformity and international character.⁶⁵ At the very least, most scholars are in agreement that Article 7(1) effectively rejects reliance on domestic case law to interpret the CISG.⁶⁶ However, Article 7(1) makes no mention of its preference for foreign case law, general principles of private international law, or general principles of the CISG, among other sources.⁶⁷

IV. METHODS OF INTERPRETING THE CISG

The goal of interpreting the CISG with regard to its international character is easier said than done. While discussing the interpretation of the CISG, one must bear in mind an obvious yet fundamental principle—in all cases which involve the CISG, a judge in a national court should *first* look at the CISG itself to determine if there is a particular provision that is directly applicable.⁶⁸ For example, if a case involves a question of whether an irrevocable offer is terminated when the offeror receives a rejection letter from the offeree, the first step a judge must take is to look to the CISG, assuming that the CISG governs the contract.⁶⁹ Article 17 of the CISG is directly on point, providing “[a]n offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.”⁷⁰ Thus, the judge makes his or her decision based on Article 17 of the CISG.

However, few cases are that simple, and normally a judge must resort to other means of finding an answer to the problem presented when the Convention is silent or does not address the specific problem at hand. In general, there are

65 See generally Flechtner, *supra* note 47, at 216 (advocating the idea that the CISG requires a process and mind set with a regard for the need to promote uniformity); Koneru, *supra* note 37, at 152 (proposing courts look to the convention to maintain an international approach); Van Alstine, *supra* note 63, at 792 (concluding the CISG implicitly requires a remedial role by the judiciary to ensure long term viability).

66 See Garro, *supra* note 56, at 1156; *cf.* Koneru, *supra* note 37, at 107.

67 *Cf.* CISG, *supra* note 31, art. 7(1) (stating that regard is to be had to the CISG’s international character, its need to promote uniformity, and its application and observance of good faith in international trade).

68 *Cf. id.* art. 7(2) (stating “[q]uestions concerning matter governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. . . .”) (emphasis added).

69 Assume that the issue being reviewed is governed by the CISG under Article 1, and it does not fall outside the scope of the CISG in Articles 2 through 6. See CISG, *supra* note 31.

70 CISG, *supra* note 31, art. 17.

seven potential sources a tribunal can look to for guidance in interpreting the CISG. In order of persuasiveness, they are: (1) general principles of contract law contained in the CISG; (2) the legislative history of the CISG; (3) case law from foreign jurisdictions interpreting the Convention; (4) treatises and commentary of noted scholars on the CISG; (5) general principles of private international law; (6) case law from domestic jurisdictions interpreting the Convention; and (7) case law from domestic jurisdictions interpreting domestic sales law.

The order of persuasiveness of these seven sources is based around three principles. First and foremost, the sources are ranked according to their ability to promote uniformity in interpretation and maintain the international character of the CISG. Second, they are ordered with the understanding that the CISG contains both common law and civil law traditions, thus intertwining common law ideas relying on case law with civil law tradition relying upon noted and eminent scholars.⁷¹ Third, they are ranked according to their ability to provide the most accurate finding for either party based on the governing law of the CISG.

However, before looking at the persuasiveness of these seven sources, a preliminary question must be addressed—what exactly is the CISG? Is the CISG a code, a statute, a treaty, a set of guidelines, or decisional rules? The very nature of the CISG will determine, to a certain extent, what methods of interpretation should govern and the order in which they should be applied. The answer, among many scholars, seems to be a mixture of all of the above. Arthur Rossett speaks of the CISG as a code, where a civil law approach to interpretation should be used—looking within the CISG for principles and using scholarly writings.⁷² John Honnold looks at the CISG as a law that can adapt to new circumstances, unlike more restrictive codes such as tax laws.⁷³ However, he also adopts the notion that the CISG is a code, and favors looking inwards to the four corners of the Convention rather than outwards, where there is no “ocean of

⁷¹ See generally Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2205–06 (1991) (discussing the idea that civil law traditions place great emphasis on writings of legal academics).

⁷² See Rosett, *supra* note 21, at 297–98.

⁷³ Cf. Honnold, *supra* note 45, at 60–61 (stating that laws which may be readily amended, like tax laws, may indulge in details; however, international laws must grow and adapt to novel circumstances and changing times).

uncodified common law” that supports other codes.⁷⁴ Michael Van Alstine also favors a “dynamic interpretation approach” to the CISG rather than a restrictive formalist approach.⁷⁵

The differing views among interpreters of the Convention seem to suggest a consensus that the common law approach of judicial interpretation through case law should be used to interpret the CISG, as well as the civil law “positivist” type approach of looking to the text of the Code to find solutions. In addition, academic writings by noted scholars and legislative history should be used for interpretation. At the same time, there is also the notion that the CISG co-exists both as a code with rules set in stone to govern the international sale of goods, and a living breathing document that will adapt as the international trading scene evolves over time.⁷⁶ The unique nature of the CISG can be attributed to several factors—its position as an international code with both common law and civil law traditions embedded in it; the fact that the CISG will be used by many countries with very different legal systems; and the rapidly changing international trading scene.⁷⁷ This section explores the persuasive value and usefulness of each of the seven sources that can be used to interpret the CISG.

A. General Principles of Law in the Convention

Article 7(2) states that questions concerning matters governed by this Convention that are not expressly settled in the Convention should be settled on general principles within the Convention.⁷⁸ Thus, Article 7(2), at least in the realm of gap-filling, explicitly guides tribunals and practitioners to look at general principles.⁷⁹ Moreover, under Article 7(1), in order to promote the uniformity of the CISG, tribunals should look to the four corners of the Convention itself to determine if a solution can be found within the text.⁸⁰

⁷⁴ See *id.* at 61.

⁷⁵ Van Alstine, *supra* note 63, at 692.

⁷⁶ Cf. Van Alstine, *supra* note 63, at 792 (arguing that the paradigm embraced in the U.N. Sales Convention suggests the image of a living, maturing body of law which is founded on certain fundamental values but capable of adapting to new environments).

⁷⁷ See Hillman, *supra* note 3, at 21.

⁷⁸ CISG, *supra* note 31, art. 7(2).

⁷⁹ See *id.*

⁸⁰ See Honnold, *supra* note 45, at 61–62.

Article 7(2) is a product of compromise.⁸¹ During the drafting of the CISG, civil law traditions dictated that courts could fill gaps by applying both the Convention's general principles, and, either directly or by analogy, the more specific principles embedded in particular provisions.⁸² This is known as the "true-code" method of interpretation—no gaps exist because principles and policies supply answers when the text gives out.⁸³ However, drafters from common law countries questioned whether ample principles could be found in the Convention.⁸⁴ The drafters were also concerned that tribunals from diverse countries might ascribe conflicting meanings to the principles.⁸⁵ As a compromise, the final result includes a priority system where the Convention's principles trump domestic rules, but the drafters offer no guidance when principles give out.⁸⁶ There are four principles which address gaps in the Convention:

1. Enforcement of the parties' intentions;
2. Ensuring that each party receives the fruits of the exchange;
3. Keeping the deal together; and
4. Awarding damages to compensate aggrieved parties and not to punish breaching parties.⁸⁷

Other principles that can be gleaned from the CISG include reasonable conduct by parties, and protecting restitution, reliance, and expectation interests of the aggrieved party.⁸⁸ These principles are persuasive in interpreting the contract because Article 7(2) specifically calls for their use and these principles help maintain the uniformity of the CISG in interpretation.⁸⁹ The use of these principles minimizes the confusion inherent in conflicts rules and avoids the uncritical and wooden application of domestic law scraps that were developed without regard for the special needs of international trade.⁹⁰

81 Hillman, *supra* note 3, at 22.

82 *Id.* at 22–23.

83 *Id.* at 23.

84 *See* Hillman, *supra* note 3, at 23.

85 *See id.*

86 *See id.*

87 *Id.* at 26–27.

88 Koneru, *supra* note 37, at 120.

89 *See* CISG, *supra* note 31, art. 7(2) (stating that interpreters of the code should look to the principles of the Convention for guidance).

90 Honnold, *supra* note 38, at 157.

B. Legislative History of the CISG.

The legislative history of a treaty is always a good source for interpretation of an ambiguous provision. Legislative history provides insight into the Convention framers' intent and their perceptions regarding its application and scope. To read the words of a convention with regard to its international character requires that it be interpreted against an international background.⁹¹

The use of legislative history has long been accepted in many civil law countries.⁹² However, "[l]egislative history (like vintage wine) calls for discretion."⁹³ The caveat is that all tribunals should be careful when observing legislative history. Commentary by various countries often conflicts. Likewise, rules or policies may be proposed that are never enacted and should never be part of the final interpretation of the article.⁹⁴ A statement by one delegate does not establish a prevailing point of view.⁹⁵ The only legitimate role for legislative history is to shed light on the meaning of the *final* text.⁹⁶ Thus, a look at the history of the CISG, though useful, should be approached with some caution.

C. Case Law from Foreign Jurisdictions.

Case law from foreign jurisdictions interpreting the CISG does have persuasive value and should be used by a tribunal.⁹⁷ This method undoubtedly is more a common law approach to interpretation than a civil law approach.⁹⁸ However, the goal of uniformity in the interpretation of an international sales convention makes the use of decisions by foreign tribunals particularly attractive. Indeed, one can imagine a situation where countries engage in a certain degree of self-regulation, overturning decisions by tribunals

91 *Id.* at 136.

92 In European civil law systems, legislative history is known as "*travaux préparatoires*." *Id.* at 138.

93 Honnold, *supra* note 45, at 141.

94 Van Alstine, *supra* note 63, at 714–15.

95 *See id.* at 717–18. Textualists would abandon outside sources and argue that the plain meaning of a statute is the best indicator of the legislature's intent. *Id.* at 717.

96 Honnold, *supra* note 45, at 142.

97 *See* Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 247 (1998).

98 *See* Honnold, *supra* note 45, at 143.

that incorrectly interpret the CISG regardless of the jurisdiction of that tribunal.

However, the use of foreign case law does impose a number of problems. First, foreign case law is not always readily available, although the Pace University website has done much to solve this problem.⁹⁹ Second, foreign case law is often in a language that is unknown to a tribunal.¹⁰⁰ Third, there is no supranational tribunal to provide a final determination as to the interpretation of the CISG like the highest court within a sovereign state.¹⁰¹ In fact, UNCITRAL rejected the idea of creating an international tribunal to which all cases could be referred.¹⁰² Thus, it is conceivable that there could be widely divergent interpretations of the CISG that vary from country to country. Interpretations may vary based on a country's location, socioeconomic status, and form of government. Fourth, case law from different jurisdictions will have different weights of authority for various tribunals. U.S. courts may find that decisions from Germany and the United Kingdom are particularly persuasive, while decisions from Chilean or Ugandan courts may carry less weight. Countries could pick and choose which foreign case law they find persuasive based on the general competency of the tribunal in the nation's governmental system.¹⁰³ Furthermore, judges in common law systems may be prone to looking at cases from common law jurisdictions, as opposed to civil law jurisdictions. Thus, a "supranational stare decisis" is an unrealistic goal.

Nevertheless, foreign case law can prove helpful to a tribunal and can help to achieve a certain degree of uniformity. However, foreign case law should never be binding on any court.

One U.S. court has indirectly displayed its willingness to respect a decision based on foreign precedent. In *Medical Marketing v. Internazionale Medico Scientifica*,¹⁰⁴ Judge Stanwood Duval affirmed the decision of an arbitration panel in favor of Medical Marketing, Inc. The decision was made by

⁹⁹ Ferrari, *supra* note 97, at 254–55. The Pace University Institute of International Commercial Law Website is located at <http://cisg.law.pace.edu>.

¹⁰⁰ Ferrari, *supra* note 97, at 254.

¹⁰¹ *Id.* at 256.

¹⁰² *Id.*

¹⁰³ Although there may be hundreds of cases at a court's disposal, referral to decisions from foreign jurisdictions is rare. *Id.* at 225.

¹⁰⁴ No. Civ. A. 99–0380, 1999 WL 311945 (E.D. La. May 17, 1999).

relying on a case from the German Supreme Court and a judicially created exception to Article 35 of the CISG in the German case.¹⁰⁵ The court found that the arbitration panel did not “exceed its powers” in violation of the FAA by applying international sales law.¹⁰⁶ Thus, *Medical Marketing* demonstrates a small step towards the willingness of courts to use foreign precedent to interpret the CISG.

D. Treaties and Commentary of Noted Scholars

As a matter of general international law, commentary by prominent scholars is a source of law. This is derived from Article 38 of the Statute of the International Court of Justice, widely recognized as a list of the sources of international law.¹⁰⁷ Courts in Europe and the United States do give some weight to scholarly material, although in different degrees.¹⁰⁸ For example, in the United States treatises such as the Restatements are given a great deal of weight in judicial decision-making.¹⁰⁹

Some U.S. courts have been receptive to using treatises by John O. Honnold, and law review articles by Henry Gabriel and Harry Flechtner, among others.¹¹⁰ These sources can provide guidance to interpreting the CISG but should generally be viewed as a secondary source of law.

E. General Principles of Private International Law

Other sources that may be used to interpret the CISG are general principles of private international law, most notably the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles were created by a Working Group consisting of academics, judges, and civil servants sitting in their personal capacities.¹¹¹ The goal of the

¹⁰⁵ *Id.* at *2 (citing Entscheidung des Bundersgerichtshofs in Zivilsachen (BHGZ) 129, 75 (1995)).

¹⁰⁶ *Id.*

¹⁰⁷ Statute of the International Court of Justice, 59 Stat. T.S. No. 993, art. 38 (1945).

¹⁰⁸ See Honnold, *supra* note 45, at 144.

¹⁰⁹ W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1295 n. 26 (1997).

¹¹⁰ See discussion *infra* Part V.B.

¹¹¹ The UNIDROIT Principles of International Commercial Contracts, *reprinted in* BURTON & EISENBERG, CONTRACT LAW: SELECTED SOURCE MATERIALS (1999).

UNIDROIT Principles is to set forth general rules for international commercial contracts.¹¹² The Principles were intended to enunciate communal principles and rules of existing legal systems and to select the solutions that are best adapted to the special requirements of international commercial contracts.¹¹³

Occasionally, the UNIDROIT Principles mirror the CISG provisions and provide a more detailed guide to the practitioner and tribunal.¹¹⁴ The use of the UNIDROIT Principles precludes an easy resort to domestic law by offering rules of law that are more suitable to an international commercial contract.¹¹⁵ One scholar has likened the relationship of the UNIDROIT Principles with the CISG to that of the UCC with the principles of common law and equity in a supplementary role.¹¹⁶

For example, if an issue were to arise regarding the proper rate of interest to be applied to a monetary obligation due under a sales contract governed by the CISG, Article 78 merely provides for the obligee's right to interest.¹¹⁷ However, UNIDROIT Principle Article 7.4.9(2) provides that the applicable rate of interest shall be the average bank short-term lending rate to prime borrowers, providing for the currency of payment at the due place of payment, or in the absence of such a rate, the rate fixed by the law of the state in which the payment has to be made.¹¹⁸ Thus, the UNIDROIT Principles fill a gap where the CISG is silent.

The UNIDROIT Principles also have a number of advantages over other methods used to interpret the CISG. First, the UNIDROIT Principles were made by a group of legal scholars from different nations.¹¹⁹ Because it is not an international treaty, the great need for compromise and generality found in the CISG was obviated.¹²⁰ Second, clear points of commonality may be found between the CISG and the UNIDROIT Principles, such as the principle of good faith, ample recognition of party autonomy, and freedom of form,

112 *Id.*

113 *Id.*

114 *See* Garro, *supra* note 56, at 1152.

115 *Id.* at 1152-53.

116 *Id.* at 1155.

117 CISG, *supra* note 7, art. 78.

118 Garro, *supra* note 56, at 1157.

119 *See id.* at 1160.

120 *Id.*

among others.¹²¹ The complementary nature of the UNIDROIT Principles with the CISG makes them particularly useful to help expand on the wording of the CISG and maintain the international character of the interpretation.

F. Case Law from Domestic Jurisdictions Interpreting the CISG.

Contrary to the general authority, reference to other cases within the jurisdiction of a country could provide some uniformity in the interpretation of the CISG in that country.¹²² A court can examine the reasoning of another court within the jurisdiction and comment on its persuasiveness. The use of domestic case law interpreting the CISG could then serve as a check within the jurisdiction, ensuring that correct application of the CISG has taken place.¹²³ While it is also true that a bad decision may be followed by other courts that are too lazy to do the required research, this situation probably will only occur in a minority of cases. Attorneys on either side will be sure to point out the flawed reasoning on cases that hurt their position, and judges will use this flawed reasoning to discredit the case in their opinion if the reasoning is indeed invalid. This source of interpretation will clearly have more value to countries in a common law system rather than a civil law system.¹²⁴

G. Case Law from Domestic Sales Law

Most commentators reject the use of domestic sales law to interpret the CISG.¹²⁵ Whether it is used to interpret provisions of or to fill gaps in the Convention, domestic sales law should not be used by a court as a primary or even secondary source because it severely destroys the preservation of the international character of the CISG. Differences between the UCC and the CISG are readily apparent in numerous respects—the parol evidence rule, statute of frauds, and battle of the forms—and resorting to

¹²¹ See *id.* at 1164–65.

¹²² See Hillman, *supra* note 3, at 22; see also Koneru, *supra* note 37, at 106; Ferrari, *supra* note 97, at 246.

¹²³ See Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 92 (1998).

¹²⁴ Hillman, *supra* note 3, at 22; see also Koneru, *supra* note 37, at 106; Ferrari, *supra* note 97, at 246.

¹²⁵ Koneru, *supra* note 37, at 106; see also Ferrari, *supra* note 97, at 246; Hillman, *supra* note 3, at 22.

domestic sales law could provide a conflicting interpretation with the CISG.

One commentator has labeled the phenomenon of a court using domestic ideas to interpret an international treaty as the “homeward trend.”¹²⁶ These ideas are the different background assumptions and conceptions that are embedded in judges and lawyers during their intellectual formation in different countries.¹²⁷ This “homeward trend” effect can even take place at the level of unarticulated and unconscious background suppositions.¹²⁸ Judges are the products of different cultural, legal, and political traditions. Thus, there is the increased tendency that in interpreting international standards, tribunals will resort to familiar norms of domestic law to guide their interpretations.¹²⁹ Until all other means have been exhausted, domestic case law on domestic sales law should not be used to interpret the CISG.

V. U.S. COURT DECISIONS ON THE CISG.

While the number of U.S. cases involving the CISG as the governing law has been scarce, a number of federal district courts and courts of appeals have had to struggle with applying and interpreting the Convention in the past few years. This number is bound to increase in the future. The United States engages in trade with numerous countries and unless a contract with a CISG State party provides for a “choice of law” clause in regard to the sale of goods, the Convention is the governing law. With the lack of U.S. case law applying the CISG, courts in the United States face a daunting task of interpreting some of the vague language contained in the Convention. This section will examine five significant cases to date that apply the CISG and analyze their interpretation techniques. Specifically, this section will explore the use of the above seven interpretation methods by these courts, and their attempt to find a solution when the CISG does not provide clear direction.

126 See Honnold, *supra* note 1, at 1.

127 Flechtner, *supra* note 47, at 200 (elaborating on Honnold’s “homeward trend”).

128 See *id.* at 204.

129 Van Alstine, *supra* note 63, at 704.

A. Filanto, S.p.A. v. Chilewich Int'l Corp.

*Filanto*¹³⁰ is the first U.S. judicial interpretation of the CISG.¹³¹ The facts of *Filanto* are complex, and therefore, require more than a brief statement. *Filanto*, an Italian Shoe Manufacturer, brought suit for breach of contract against Chilewich, a New York international trading firm.¹³² In February 1989, Bylerly Johnson Ltd., an agent of Chilewich operating in the United Kingdom, signed an agreement (the "Russian Contract") with Raznoexport, the Soviet Foreign Economic Association.¹³³ The Russian Contract obligated Bylerly to supply footwear to Raznoexport and also contained an arbitration clause stating that disputes were to be settled in Russia.¹³⁴ Bylerly contacted *Filanto* to supply the footwear.¹³⁵ In March 1990, Chilewich sent *Filanto* a standard merchant's memo for signature by both parties to confirm the delivery and performance.¹³⁶ Both *Filanto* and Chilewich agreed that this constituted an offer.¹³⁷ The memo provided that *Filanto* and Chilewich agreed that the terms of the Russian Contract governed, including the Russian Arbitration clause.¹³⁸ Two months later, *Filanto* had still not replied to this memo.¹³⁹ However, Chilewich proceeded to open a letter of credit in favor of *Filanto*.¹⁴⁰

Filanto finally answered the March 1990 memo, returning a signed copy to Chilewich, but also attaching a cover letter excluding the Russian arbitration clause.¹⁴¹ On the same day, Chilewich telexed Bylerly stating that it would

130 *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1229 (S.D.N.Y. 1992).

131 Gary Kenji Nakata, *Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth Under the CISG's International Battle of The Forms*, 7 *TRANSNAT'L LAW*. 141, 142 (1994).

132 *Filanto*, 789 F. Supp. at 1229.

133 *Id.* at 1230.

134 *Id.* at 1230-31 (indicating that the arbitration clause read "[a]ll disputes or differences which may arise out of or in connection with the present Contract are to be settled, jurisdiction of ordinary courts being excluded, by the Arbitration at the USSR Chamber of Commerce and Industry, Moscow, in accordance with the Regulations of the said Arbitration.>").

135 *Id.*

136 *Id.* at 1231.

137 *Filanto*, 789 F. Supp. at 1238.

138 *Id.* at 1231-32.

139 *Id.* at 1232.

140 *Id.*

141 *Id.* at 1231-32.

not open the second letter of credit without receiving a signed copy of the merchant's agreement from Filanto.¹⁴² Several weeks later, Bylerly sent a fax to Filanto asking Filanto to accept all terms of the Russian Contract.¹⁴³ The remainder of the facts are in dispute. Chilewich claimed that over a course of meetings, Filanto accepted the terms of the Russian Contract.¹⁴⁴ At the same time, Filanto asserted that Chilewich abandoned his request for the contract exclusions.¹⁴⁵

The Court was left to determine whether an agreement to arbitrate existed between the parties.¹⁴⁶ Initially, Chief Judge Brieant determined that the CISG was the applicable law. Citing Article 1(1)(a), the Court stated that because both Italy and the United States were signatories to the CISG and Filanto had its factories in Italy and Chilewich's principle place of business was located in White Plains, New York, the CISG was the applicable law.¹⁴⁷ The Court concluded that an agreement to arbitrate existed based on Filanto's failure to object to the arbitration clause in a timely fashion.¹⁴⁸ The court rejected Filanto's argument that its August 7, 1990 letter to Chilewich, which partially rejected the Russian arbitration clause, was a counteroffer.¹⁴⁹ The court relied on Article 18(1) in stating that because of the extensive course of prior dealings between the parties, Filanto was under a duty to alert Chilewich in a timely fashion to its objections.¹⁵⁰

142 *Filanto*, 789 F. Supp. at 1232.

143 *Id.* at 1232. The term "Russian Contract" is used by the Court to refer to the contracts signed with Raznoexport, the Soviet Foreign Economic Association, because all relevant events occurred in the Republic of Russia. *Id.* at 1230.

144 *Id.* at 1232-33 (noting that Filanto and Chilewich met in Moscow September 2 through September 5, 1990, and again in Paris over the weekend of September 14, 1990. Chilewich's claims refer to the Paris meeting.).

145 *Id.* at 1232-33 (noting that Filanto's claims refer to the Moscow meetings, September 2-5, 1990).

146 *Id.* at 1235 (determining that the threshold question was not the scope of the arbitration provision in the Russian contract, but whether there was an arbitration agreement between the parties at all).

147 *Filanto*, 789 F. Supp. at 1234, 1237.

148 *Id.* at 1239-40 (stating that the Court based its decision on Restatement (Second) of Contracts § 69 which states that the failure of an offeree to notify the offeror of objections to the terms of a contract in a reasonable time, knowing that the offeror has commenced performance, may be deemed to have agreed to the terms).

149 *Id.* at 1232, 1238.

150 *Id.* at 1240 (citing CISG art. 18(1)).

The issue in *Filanto* revolved around the CISG's provisions for "battle of the forms".¹⁵¹ Under UCC Article 2-207, a contract is formed even if the acceptance varies materially with the terms of the offer.¹⁵² However, under the CISG, an acceptance, which differs materially with the terms of the offer, will not result in a contract but rather a counteroffer.¹⁵³ Thus, the UCC and the CISG differ significantly in their "battle of the forms" provisions, such that a case like *Filanto* would differ in result depending on which law was applied and the analysis used in applying that law.

The court then applied the CISG instead of the UCC 2-207 "battle of the forms" provision, which the defendant had contended was the proper law to apply.¹⁵⁴ The court also correctly looked to two articles contained in the Convention to decide the case, most notably Article 18(1) which states: "A statement made by or other conduct of an offeree indicating assent to an offer is an acceptance."¹⁵⁵ Furthermore, the court also relied upon Article 8(3):

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.¹⁵⁶

However, the court did not look beyond the CISG to any of the approved interpretation techniques listed in Part III of this article. Rather, the court looked to domestic case law for the proposition that "[a]n offeree who knowing that the offeror has commenced performance, fails to notify the offeror of its objection to the terms of the contract within a

151 U.C.C. § 2-207 cmt. 1 (1994) (describing the "battle of the forms" as "the exchange of printed purchase order and acceptance (sometimes called 'acknowledgment') forms. Because the forms are orienting to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's forms. Nevertheless, the parties proceed with the transaction.").

152 U.C.C. § 2-207 (1990).

153 CISG, *supra* note 31, art. 19(2).

154 *Filanto*, 789 F. Supp. at 1238.

155 *Id.* at 1240 (citing CISG art. 18(1) and noting that mere silence or inactivity does not constitute acceptance).

156 CISG, *supra* note 31, art. 8(3); *see also Filanto*, 789 F. Supp. at 1240.

reasonable time will, under circumstances, be deemed to have assented to those terms.”¹⁵⁷

The Court cited to the Restatement (Second) of Foreign Relations, as well as two Southern District of New York cases for this rule of law.¹⁵⁸ The court noted that CISG Article 18(1) allowed it to consider conduct as an acceptance, and CISG Article 8(3) allowed it to look at prior dealings.¹⁵⁹ Thus, the court enacted its own interpretation of the CISG, allowing prior dealings accompanied by silence to the present transaction to constitute an acceptance despite Article 18(1) which specifically excludes silence as a form of acceptance.¹⁶⁰ The court came to this conclusion based, in part, upon the principle from domestic case law. Ironically, this conclusion is reached even though the facts do not state or describe the prior dealings between the parties.¹⁶¹ If the court had looked at the UNIDROIT Principles, for example, the court would have found that Article 2.6(1) requires conduct of the offeree to indicate assent.¹⁶² Furthermore, under Article 2.6(3), the UNIDROIT Principles state that as a result of practices the parties have established between themselves, the offeree may indicate assent by performing an *act* without notice to the offeror.¹⁶³ Therefore, under the UNIDROIT Principles, mere silence is inadequate even with past usage of this form of acceptance between the parties—a specific act is necessary.¹⁶⁴ The Southern District of New York has held that the CISG allows acceptance by silence if this is the parties’ prior course of dealing.¹⁶⁵

157 *Filanto*, 789 F. Supp. at 1240 (citing to Restatement (Second) Contracts § 69(1) which provides that silence can operate as acceptance when, due to previous dealings, it is reasonable to provide notice to offeror if offeree does not intend to accept).

158 *Id.* (citing *Graniteville v. Star Knits of California, Inc.*, 680 F. Supp. 587, 590 (S.D.N.Y. 1988) (compelling arbitration because party was deemed to have accepted contract’s terms by failing to timely object to salesnote containing the arbitration clause) and *Imptex Int’l Corp. v. Lorprint, Inc.* 625 F. Supp. 1572, 1572 (S.D.N.Y. 1986) (binding the party who failed to timely object to inclusion of arbitration clause in sales confirmation clause)).

159 *Filanto*, 789 F. Supp. at 1240.

160 Nakata, *supra* note 131, at 155–56.

161 *Id.* at 160.

162 BURTON & EISENBERG, *supra* note 111, at 336.

163 *Id.*

164 *See id.* (relying on UNIDROIT art. 2.6(1), 2.6(3)).

165 *Filanto*, 789 F. Supp. at 1240.

Moreover, the court overlooked the fact that Chilewich's offer may have lapsed.¹⁶⁶ CISG article 18(2) states in part that, "[a]n acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed, or if no time is fixed, within a reasonable time."¹⁶⁷ Chilewich's offer to Filanto was made on March 13, 1990.¹⁶⁸ Filanto did not reply until August 7, 1990, about five months later.¹⁶⁹ If trade usage showed that five months was not a reasonable time, the court could have found that the August 7, 1990 letter was really an offer.¹⁷⁰ Thus, the court may have failed to read all the relevant provisions of the CISG.

As the first U.S case on the CISG, the *Filanto* court appeared receptive to a new form of contract law. However, there was no attempt to use legislative history, commentary by scholars, general principles of the Convention, or general principles of private international law to interpret the deciding provisions of Article 18(1) and Article 8(3).¹⁷¹ Furthermore, the court resorted to domestic case law when it found that the four corners of the CISG text could no longer help its analysis.¹⁷² While *Filanto* is not a model case of CISG interpretation, it shows a U.S. court applying a new form of international contract law and provides a precedent for U.S. courts in future cases.

B. *MCC-Marble v. Ceramica Nuova D'Agostino*

MCC-Marble v. Ceramica Nuova D'Agostino is a significant judicial interpretation of the CISG, because it required a court to consider parol evidence of subjective intent when contracting.¹⁷³ The plaintiff-appellant, MCC-Marble Ceramic, Inc. ("MCC-Marble") is a Florida corporation engaged in the retail sale of tiles, and the defendant Ceramica Nuova D'Agostino ("D'Agostino") is an Italian corporation engaged in

¹⁶⁶ Nakata, *supra* note 131, at 158.

¹⁶⁷ CISG, *supra* note 31, art. 18(2).

¹⁶⁸ *Filanto*, 789 F. Supp. at 1231.

¹⁶⁹ *See id.* at 1231-32.

¹⁷⁰ Nakata, *supra* note 131, at 158-59.

¹⁷¹ *See* discussion *infra* Part IV for a detailed discussion of the methods of interpreting the CISG.

¹⁷² *Filanto*, 789 F. Supp. at 1239.

¹⁷³ Jee J. Kim, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuovo D'Agostino S.p.A.*, 12 N.Y. INT'L. L. REV. 105, 105 (1998).

the manufacture of ceramic tiles.¹⁷⁴ MCC-Marble brought suit against D'Agostino claiming that they had breached a February 1991 requirements contract by failing to make payments.¹⁷⁵ D'Agostino contended that according to the pre-print contract terms, it was under no obligation to fulfill MCC-Marble's orders because MCC-Marble had defaulted on payments for previous contracts.¹⁷⁶ In turn, MCC-Marble stated that it never intended to be bound by the provisions contained on the reverse side of the contract.¹⁷⁷ Both parties provided affidavits to support their contentions.¹⁷⁸

The court correctly looked to the CISG as the governing law.¹⁷⁹ The issue in the case involved two principles of contract law that differ significantly between the CISG and the UCC: (1) the extent of an inquiry into the subjective intent of the parties during the formation of the contract; and (2) the use of parol evidence to determine this subjective intent.¹⁸⁰ The court recognized that while the UCC placed a preference on the objective manifestations of the parties' intent, Article 8(1) of the CISG required the court to look at the parties' subjective intent.¹⁸¹ Furthermore, the court accurately noted that the CISG did not contain a parol evidence rule like the UCC.¹⁸² The court stated that because MCC-Marble's affidavits do not objectively establish their intent not to be bound by the conditions on the back of the contract, an issue of material fact as to the parties' intentions remained.¹⁸³ Thus, the court reversed the grant of summary judgment by the magistrate and the district court in favor of D'Agostino.¹⁸⁴

174 *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1385 (11th Cir. 1998).

175 *Id.*

176 *Id.* (relying on the terms pre-printed in Italian on the back of the contract).

177 *Id.* at 1386.

178 *Id.* at 1385–36.

179 *MCC-Marble*, 144 F.3d at 1386.

180 *See id.* at 1387–89 (citing UCC § 2–202 and CISG art. 11).

181 *Id.* at 1387 (explaining that UCC § 2 has several references to standards of commercial reasonableness).

182 *Id.* at 1388–89 (relying on UCC § 2–202 which allows parol evidence to explain or supplement, but not to contradict, the final expression of the agreement).

183 *See id.* at 1391–92.

184 *MCC-Marble*, 144 F.3d at 1385, 1393.

This case is significant for the future of the CISG in U.S. courts for a number of reasons. First, the court resisted the temptation to look to domestic case law and instead based its entire findings on the language contained in Article 8(1) and Article 8(3) of the CISG.¹⁸⁵ Second, the court relied on “the great weight of academic commentary” to support its assertion that Article 8(3) was a rejection of the parol evidence rule.¹⁸⁶ The court relied on commentary by John O. Honnold, David H. Moore, Louis F. Del Duca, Henry D. Gabriel, Harry M. Flechtner, John E. Murray, Jr. and Peter Winship, among others.¹⁸⁷ Third, and perhaps most importantly, the court recognized the overriding need for uniformity and consistency in the interpretation of the CISG, and the inapplicability of domestic case law to interpret the Convention. The court stated:

Courts applying the CISG cannot, therefore, upset the parties’ reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.¹⁸⁸

The court used this principle of uniformity in determining that both subjective intent and parol evidence of this subjective intent had to be examined before a finding for either party could be made.¹⁸⁹ Fourth, the court cited the Pace University webpage, which covers the CISG and provides extensive treatment of each article of the Convention including case law, commentary, and legislative history.¹⁹⁰ Moreover, the court noted that the parties had failed to cite any persuasive authority from the courts of other State Parties.¹⁹¹ Thus, at least one Federal Court of Appeals has expressed its willingness to use case law from other jurisdictions to interpret the CISG. This is significant

185 *See id.* at 1391–92.

186 *Id.* at 1390.

187 *Id.* at 1391 n.17.

188 *Id.* at 1391.

189 *See MCC-Marble*, 144 F.3d at 1391–92 (considering the parties’ affidavits as evidence of subjective intent).

190 *Id.* at 1390 n.14.

191 *Id.*

because other courts in the United States may follow the lead of the Eleventh Circuit and attempt to analogize to foreign precedents. Fifth, the court, in a footnote, disagreed with a poorly reasoned decision in the Fifth Circuit holding that the parol evidence rule could be used in conjunction with the CISG.¹⁹²

MCC-Marble took a number of positive steps towards advancing uniform interpretation of the CISG. The decision in *MCC-Marble* establishes precedent by using noted scholars to assist the interpretation of the CISG,¹⁹³ recognizing the principle of uniformity of the CISG,¹⁹⁴ citing to an internet source which other U.S. courts may use in the future,¹⁹⁵ and expressing its willingness to look at foreign case law.¹⁹⁶ One could imagine that if the parties had argued their case based in part on legislative history, foreign case law, and commentary of noted scholars, the court would have been receptive to the use of this authority.

C. Delchi Carrier, S.p.A. v. Rotorex Corp.

In January 1988, Rotorex Corporation of New York agreed to sell 10,800 compressors to Delchi Carrier (“Delchi”), an Italian manufacturer of portable air conditioners.¹⁹⁷ After Delchi had paid for the first shipment, it concluded that most of the compressors had a lower cooling capacity and higher power consumption than the sample Delchi agreed to buy.¹⁹⁸ Delchi sued in a New York federal court, and the district court applying the CISG awarded summary judgment to Delchi.¹⁹⁹ Rotorex appealed to the Second Circuit on the amount of damages awarded.²⁰⁰ The Second Circuit affirmed the overall award but reversed

192 *Id.* at 1389–90; *see also* Andreason, *supra* note 9, at 365 (stating that *MCC-Marble* took a significant step in clarifying the error made by the Fifth Circuit in *Beijing Metals v. American Business Center*); *see infra* Part V.D. for a detailed discussion of the *Beijing Metals* opinion.

193 *MCC-Marble*, 144 F.3d at 1390.

194 *See* Kim, *supra* note 173, at 109.

195 *MCC-Marble*, 144 F.3d at 1389.

196 *Id.* at 1389 n.14.

197 *Delchi Carrier, S.p.A., v. Rotorex Corp.*, 71 F.3d 1024, 1026 (2d Cir. 1995).

198 *See id.* at 1027.

199 *See id.* at 1024.

200 *See id.* at 1027.

the denial of two of Delchi's claims, and remanded for further proceedings on one of them.²⁰¹

With regard to the interpretation of the CISG, the Second Circuit took a number of positive steps towards a uniform interpretation.²⁰² The Court looked to commentary by John O. Honnold for guidance on some of the provisions of the Convention.²⁰³ Furthermore, the Court noted that “[b]ecause there is virtually no caselaw under the Convention, we look to its language and to ‘the general principles’ upon which it is based.”²⁰⁴ Thus, the court recognized the importance of looking to the general principles contained in the Convention, the most persuasive authority as stated in Part IV. However, *Delchi Carrier* is by no means a model decision for other courts to follow. In the absence of a specific provision for calculating lost profits in the CISG, the Court did the unthinkable—it resorted to domestic law.²⁰⁵ The Court noted that the CISG does not explicitly state whether only variable expenses or both fixed and variable expenses should be subtracted from sales revenue in calculating lost profits.²⁰⁶ The Court stated that “[i]n the absence of a specific provision in the CISG for calculating lost profits, the district court was correct to use the standard formula employed by most American courts and to deduct only variable costs from sales revenue to arrive at a figure for lost profits.”²⁰⁷

The Second Circuit did not examine the legislative history of Article 74 of the CISG, which governs the provision of lost profits. Neither did the Court look to any academic commentary, foreign case law, or the Secretariat Commentary. Instead, the Second Circuit resorted to American law, an option that has been uniformly rejected by all commentators who have evaluated Article 7(1) of the

201 *See id.* at 1031.

202 *See* discussion *infra* Part III (explaining requirements to establish uniform interpretation of the CISG).

203 *See Delchi Carrier*, 71 F.3d at 1028 (citing John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 60–62 (2d ed. 1991)).

204 *Delchi Carrier*, 71 F.3d at 1027–28.

205 *See id.* at 1030 (citing *InduCraft, Inc. v. Bank of Baroda*, 47 F.3d 490, 495 (2d Cir. 1995) and *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 92–93 (2d Cir. 1984)).

206 *See id.* at 1029–30; *see also* CISG, *supra* note 31, art. 74–78.

207 *Delchi Carrier*, 71 F.3d at 1030.

CISG.²⁰⁸ The Second Circuit noted its willingness to resort to this option early in the decision when it stated that case law “interpreting analogous provisions of Article 2 of the Uniform Commercial Code may also inform a court where the language of the relevant CISG provisions track that of the UCC.”²⁰⁹ The Court, although recognizing the need to preserve the international character of the Convention, was content to escape into the comfortable niche of U.S. case law when the Convention was silent.

Moreover, one commentator on the *Delchi* case stated that the court’s application of the CISG was cursory, and “[s]pecial care and thoroughness were not taken, and thus the opinion does not provide the much anticipated insight into a U.S. court’s rationale and interpretation of the CISG.”²¹⁰ This is mainly because of the court’s numerous conclusions on the law of the CISG without citing any authority in support of these conclusions. For example, the court awarded damages without discussing the CISG provisions dealing with breach and cure.²¹¹ The Court did not engage in a detailed discussion of the foreseeability requirement in the CISG and made conclusions without any legal analysis in the opinion.²¹² Also, the Court followed the domestic tradition of discretionary awards of pre-judgment interest of liquidated damages without looking at the legislative history of Article 78.²¹³ It is unclear from the drafting history and Article 78 itself whether the drafters intended to award such interest, and arguably conflict of law rules should have applied to determine which law should apply on the award of this interest.²¹⁴

The *Delchi* opinion has been deemed “an unfortunate first decision on the subject of consequential damages under

208 See discussion *infra* Part III.6 (reviewing the use of domestic case law to interpret the CISG).

209 *Delchi Carrier*, 71 F.3d at 1028 (commenting on the fact that UCC caselaw is not per se applicable).

210 Joanne M. Darkey, *A U.S. Court’s Interpretation of Damage Provision Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CSIG of a Missed Opportunity?*, 15 J.L. & COM. 139, 151 (1995).

211 See *id.* at 144–48.

212 See *id.*

213 See *id.* at 148–49.

214 Eric C. Schneider, *Consequential damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT’L BUS. L. 615, 647–48 (1995).

the CISG.”²¹⁵ While the *Delchi* decision is not a well-reasoned opinion, it is the first time a U.S. court has grappled with the damages provision of the CISG. More thorough analysis of the Convention is bound to appear in the future to expand on the brevity found in the *Delchi* decision.

D. Mitchell Aircraft Spares, Inc. v. European Aircraft Service

The plaintiff, Mitchell Aircraft Spares, is an Illinois corporation that acts as a speculator and broker in the market for surplus commercial aircraft parts.²¹⁶ European Aircraft Services (“EAS”) is a Swedish corporation that buys parts from companies in Western Europe and the United States and sells these parts to airlines and other similar international companies.²¹⁷ The dispute between the two parties arose over an agreement that EAS would sell certain aircraft parts to Mitchell.²¹⁸ Mitchell filed suit alleging breach of contract and breach of warranty by EAS.²¹⁹ Both parties agreed that the CISG governed the case.²²⁰

The court’s main focus in the opinion is whether the parol evidence rule applied under the CISG.²²¹ Mitchell argued that the court was barred from considering parol evidence because the contract is clear and unambiguous.²²² The Court noted that it could not find any case in the Seventh Circuit on whether courts can consider parol evidence under the CISG.²²³ However, after noting that there “was virtually no case law under the Convention,” the court addressed the issue by looking to the Eleventh Circuit’s decision in *MCC-Marble*.²²⁴ The Court agreed with the *MCC-Marble* decision and found that it could consider evidence concerning any negotiations, agreements, or statements made prior to the issuance of the purchase order in the case

²¹⁵ *Id.* at 616.

²¹⁶ *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv.* AB, 23 F. Supp. 2d 915, 916 (N.D. Ill. 1998).

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *See id.* at 918.

²²⁰ *See id.* (explaining that the district court accepted use of the CISG because Mitchell did not oppose its application).

²²¹ *See Mitchell Aircraft Spares*, 23 F. Supp. 2d at 919–21.

²²² *See id.* at 919.

²²³ *See id.*

²²⁴ *See id.* (quoting *Delchi Carrier*, *supra* note 12, at 1028).

to determine whether the parties contracted for EAS to sell Mitchell three parts.²²⁵ Thus, the Court denied summary judgment for both parties because it found, based on the parol evidence of invoices, faxes, and live testimony, that there was an issue of material fact as to whether EAS had contracted to sell Mitchell these parts.²²⁶ The admission of the parol evidence allowed the court to look beyond the four corners of the purchase order to determine the parties' intent.²²⁷

Moreover, the court took the bold step of disagreeing with the Fifth Circuit in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr.*,²²⁸ just as the Eleventh Circuit did in *MCC-Marble*.²²⁹ In *Beijing Metals*, the defendant sought to avoid summary judgment on a contract claim by relying on evidence of contemporaneously negotiated oral terms that the parties had not included in their written agreement.²³⁰ The plaintiff, a Chinese Corporation, relied on Texas law in its complaint, while the defendant, a Texas corporation, relied on the CISG.²³¹ Without resolving the choice of law question, the Fifth Circuit stated that the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute.²³² The Court apparently did not undertake any analysis of the CISG. If it did, a small amount of research on Article 8(3) would clearly indicate that the parol evidence rule has been rejected by the Convention.²³³

Both *Mitchell Aircraft* and *MCC-Marble* have disagreed with the holding of *Beijing Metals*, effectively making this case bad law for future use by other circuits.²³⁴ *Mitchell*

225 See *id.* at 920 (opining that Article 8 of the CISG requires courts to consider parol evidence because it is probative of the parties subjective intent).

226 See *Mitchell Aircraft Spares*, 23 F. Supp. 2d at 921-22.

227 See *id.* at 920-22.

228 *Id.* at 920 n.3; see also *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr.*, 993 F.2d 1178 (5th Cir. 1993).

229 *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1390 (11th Cir. 1998).

230 See *Beijing Metals*, 993 F.2d at 1182.

231 See *id.* at 1182 n.9.

232 See *id.*

233 See CISG, *supra* note 31, art. 8(3); see also Honnold, *supra* note 38, at 170-71.

234 See Harry M. Flechtner, *More U.S. Decisions On the U.N. Sales Convention: Scope, Parol Evidence, "Validity" And Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 156-57 (1995) (stating that the approach to parol evidence taken by the Fifth Circuit in *Beijing Metals* is inconsistent with

Aircraft sheds light on some new trends in the interpretation of the CISG in U.S. courts. First, *Mitchell Aircraft* based its decision on another U.S. case applying the CISG.²³⁵ This is significant because while the use of domestic case law based on the UCC is not preferable to interpret the CISG, the use of domestic case law where the Convention governs can provide some uniformity in the interpretation of the provisions.²³⁶ Second, both *MCC-Marble* and *Mitchell Aircraft* effectively overruled *Beijing Metals'* incorrect assertion that the UCC's parol evidence rule is contained in the CISG.²³⁷ At the very least, *Mitchell Aircraft* stands for the proposition that federal courts should look outside their circuits and should maintain some uniformity in interpreting the CISG within the United States.

E. Helen Kaminski v. Marketing Australian Products

*Helen Kaminski*²³⁸ provides an example of a court that, in the absence of domestic case law, would rather not use a source to justify its decision when the CISG is silent on the exact legal issue in the case.²³⁹ In *Helen Kaminski*, the plaintiff Helen Kaminski ("Kaminski") and Marketing Australian Products ("MAP") negotiated a distributorship agreement in Australia for the exclusive right of MAP to market and distribute Kaminski's goods in North America.²⁴⁰ The terms of the agreement included the method of payment, warranty, delivery, and anticipated purchases by MAP.²⁴¹ In February 1996, one month later, the distributorship agreement was amended to cover the sale of identified goods

the CISG); see also *MCC-Marble*, 144 F.3d at 1390; *Mitchell Aircraft*, 23 F. Supp. 2d at 920 n.3.

²³⁵ *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915, 919-21 (N.D. Ill. 1998) (relying on the Eleventh Circuit's opinion in *MCC-Marble*).

²³⁶ See discussion *infra* Part III.6.

²³⁷ See *MCC-Marble Ceramic Ctr, Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1390 (11th Cir. 1998); see also *Mitchell Aircraft Spares*, 23 F. Supp. 2d at 920.

²³⁸ *Helen Kaminski Pty., Ltd. v. Marketing Australian Prod., Inc.*, 1997 WL 414137, at *1 (S.D.N.Y. July 23, 1997).

²³⁹ See Victoria M. Genys, *Blazing a Trail in the "New Frontier" of the CISG: Helen Kaminski Pty. v. Marketing Australian Products, Inc.*, 17 J.L. & COM. 415, 426 (1998).

²⁴⁰ See *Kaminski*, 1997 WL 414137, at *1.

²⁴¹ *Id.*

that were already located in the United States.²⁴² When MAP issued purchase orders for additional products, a number of problems occurred.²⁴³ In sum, Kaminski sought an order in an Australian court that would declare the distributorship agreement invalid and terminated because of MAP's failure to cure the defects, namely the failure to produce letters of credit.²⁴⁴ Kaminski filed an action in U.S. bankruptcy court for an order extending the period of time that MAP had to cure the defaults under the Distributorship agreement.²⁴⁵ Kaminski moved to dismiss the complaint, with one of the grounds being that the CISG superseded the Bankruptcy Code.²⁴⁶ The bankruptcy court denied Kaminski's motion and Kaminski appealed the interlocutory order in U.S. district court.²⁴⁷ The United States District Court for the Southern District of New York found that the CISG did not apply to the distributorship agreement.²⁴⁸ The court agreed with the defendant's argument that the distributorship was merely a "framework agreement" that was not covered by the CISG.²⁴⁹ The court recognized that the distributorship agreement did not identify the goods to be sold by type, date, or price while the CISG requires an enforceable contract to have definite terms regarding quantity and price.²⁵⁰ The court seemed disturbed that there was no authority upon which to rely for its decisions, stating: "While both sides cite various secondary sources, there appears to be no judicial authority determining the reach of the CISG and, in particular, whether it applies to distributor agreements."²⁵¹

Moreover, the court concluded without reliance on any authority, that the "identification in the Distributor Agreement of certain goods—about which there is no claim of breach—is insufficient to bring the Distributor Agreement

242 *Id.*

243 *See id.*

244 *See id.* at *1-2.

245 *See Kaminski*, 1997 WL 414137, at *1 (noting MAP filed for bankruptcy in the Southern District of New York on November 29, 1996).

246 *See id.* at *1.

247 *See id.*

248 *See id.* at *3.

249 *See id.*

250 *See Kaminski*, 1997 WL 414137, at *3 (citing CISG, art. 14 that requires a proposal to indicate the goods and, expressly or implicitly, to fix a provision for determining quantity and price).

251 *Id.*

within coverage of the CISG when the dispute concerns goods not specifically identified in the Distributor Agreement.”²⁵² Thus, the court held that the Distributor Agreement did not fall within the scope of the CISG.²⁵³

With regard to the interpretative policy of the court in *Helen Kaminski*, the court looked at none of the seven sources for interpreting the CISG in deciding that distributor agreements were not covered by the CISG.²⁵⁴ First, the court could have cited to scholarly authorities concluding that “framework agreements” do not fall under the CISG.²⁵⁵ Second, the court should have also considered Articles 30 and 53 of the CISG which focus on the payment and delivery aspects of a contract.²⁵⁶ If these principles in Articles 30 and 53 were to apply, then a contract for sale could be found because Kaminski delivered the goods and transferred them to MAP.²⁵⁷ While the court was correct to rely on Article 14 which requires definiteness in an offer, including provisions for the price and quantity of the goods, the court should have struggled with the principles contained in the Convention before making a conclusion that Article 14, applies to the requirements for a contract for sale as well as an offer.²⁵⁸ Finally, the court could have looked to international case law, including a German case concluding that the CISG is not applicable to a distributorship agreement.²⁵⁹ While the *Helen Kaminski* decision may be a correct one, it is certainly not well-grounded in the interpretative sources necessary to maintain the uniformity and the international character of the CISG. One commentator has gone so far as to deem this case a prime example of the “legal ethnocentricity” of a U.S. court.²⁶⁰

252 *Id.*

253 *See id.*

254 *See infra* Part III (discussing the methods of interpretation under the CISG).

255 *See, e.g.*, Honnold, *supra* note 45, at 103 (asserting that if orders are later made and accepted, the “framework” agreement can supply transactional details to supplement the provisions of the CISG); *see also* Genys, *supra* note 231, at 435.

256 *See* CISG, *supra* note 31, arts. 30, 53.

257 *Id.*

258 Genys, *supra* note 239, at 422–23.

259 OLG Koblenz, UNILEX, No. 2 U 1230/91 (Sept. 17, 1993); *see also* Genys, *supra* note 239, at 424.

260 Genys, *supra* note 239, at 426.

VI. CONCLUSIONS ABOUT THE CISG IN U.S. COURTS

From an examination of the five cases in Part IV of this article, a number of conclusions can be drawn about the interpretation of the CISG in U.S. courts.

1. U.S. courts are still uncomfortable with the lack of domestic case law on the CISG. This is evident from the repetitive citing to the *Filanto* case, which noted that case law on the CISG was nonexistent.
2. Unfortunately, U.S. courts have resorted to the use of domestic case law interpreting domestic sales law as well. This was observed in *MCC-Marble* but appeared with a vengeance in *Delchi Carrier*.
3. U.S. judges correctly rely on the CISG itself to guide their decisions when an article is directly on point.
4. Occasionally, a court would rather make a decision using no authority than to resort to interpretative techniques that it finds unfamiliar. *Helen Kaminski* is an example of this phenomenon.
5. Judges have been comfortable with using commentators to guide their interpretation of the CISG. This was seen in *MCC-Marble* and *Delchi Carrier*.
6. Foreign case law on the CISG has yet to be considered in U.S. decisions on the Convention. The court in *MCC-Marble* at least expressed its willingness to examine foreign case law if presented before the court. The court in *Medical Marketing* recognized the role of foreign case law in making a decision on the CISG.
7. Courts have not hesitated to disagree with other courts' interpretations of the CISG that they find to be clearly erroneous. The effective "overruling" of the dicta in *Beijing Metals* by *Mitchell Aircraft* and *MCC-Marble* highlights this point.
8. Detailed and in-depth analysis of the applicable provisions of the CISG have not been undertaken by many courts. *Delchi Carrier* is an example of an opinion that deals with the CISG in a very general fashion without much analysis. However, *MCC-Marble* is an example of a court willing to get its hands a little dirty in a new sandbox and analyze the wording of the CISG text in making a decision about the applicability of the parol evidence rule.
9. Judges will rely greatly on domestic precedent on the CISG when available and when the court finds that

the precedent is an accurate interpretation of the CISG. *Mitchell Aircraft* is good evidence of this trend.

In general, U.S. courts have taken the initial steps in a long road towards achieving uniformity of the CISG. To date, U.S. courts have been receptive to secondary sources of interpreting the Convention: domestic case law on the CISG and commentary by noted scholars. Judges must begin to look at primary sources of interpretation: general principles in the Convention, general principles of private international law, foreign case law on the CISG, and the Convention's legislative history in order to effectively apply the CISG. While all four sources have their respective disadvantages, they are still reliable methods of interpreting an international treaty. Moreover, these sources can certainly be applied together. In fact, one source can effectively serve as a check on the other to ensure that an interpretation is formed that is consistent with the CISG. U.S. courts have already done well to look at commentators and U.S. domestic case law interpreting the CISG; some courts have quite properly resisted the temptation to resort to UCC Article 2.

The CISG in U.S. courts is in its infant stages. CISG issues arising in the federal district courts or court of appeals are generally issues of first impression. As the CISG comes into greater use, U.S. courts will be increasingly called upon to interpret an international sales contract in light of international sales law. Careful use of the interpretation techniques outlined in this article will promote the uniformity and international character of the CISG while at the same time help achieve a decision that is consistent with the law of the Convention. The time is ripe for courts to take positive steps to accurately interpret provisions of the CISG to pave the way for future decisions.